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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 545

RUDOLPH AND CHARLES KUDILE, CO-PARTNERS, DOING BUSINESS UNDER THE NAME OF KUDILE BROS. HASBROUCK HEIGHTS DAIRY, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 221–222) is reported in 130 F. (2d) 615. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 2–25) are reported in 28 N. L. R. B. 116.

JURISDICTION

The decree of the court below (R. 223–224) was entered on September 9, 1942. The petition for a

writ of certiorari was filed on November 25, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) of the National Labor Relations Act.

QUESTION PRESENTED

Whether the National Labor Relations Act applies to unfair labor practices committed by a partnership which is engaged in the retail sale and distribution within New Jersey of milk and other dairy products, of which 95 percent or more, valued at about $180,000 annually, are transported from New York in the form in which they are distributed.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix, *infra*, p. 8.

STATEMENT

After the issuance of a complaint, charging petitioners with unfair labor practices, and hearings thereon, the Board on November 26, 1940, issued its findings of fact, conclusions of law, and order (R. 2–25). The Board found that petitioners, a partnership, had engaged in certain unfair labor practices affecting commerce, and directed that they cease and desist therefrom and take certain affirmative remedial action (*id.*). Neither the findings concerning unfair labor practices nor the appropriateness of the order are challenged in this Court. The findings relative to the

applicability of the Act to petitioner are as follows:[1]

Petitioners are a co-partnership engaged in the purchase, sale, and distribution of dairy products, all of which are sold and distributed in New Jersey (R. 5; R. 26). Between 95 and 97 percent of the petitioners' products, valued at about $180,000 annually, are purchased from Middletown Milk and Creamery Company, which operates a dairy at Slate Hill, New York (R. 5–6; R. 26–27). Petitioners' daily requirements of bottled milk and cream are brought from Slate Hill, New York, to petitioners' dairy at Hasbrouck Heights, New Jersey, by an independent trucking company (R. 6; R. 28). The trucking company, in its transactions with petitioners, employs in full-time service one truck driver and one truck and two trailers (R. 6; R. 28). Each day a loaded trailer is transported from New York to New Jersey and the other trailer, with empty cases, is transported from New Jersey to New York (R. 6; R. 28). About 70 percent of the bottles used in this service are owned by petitioners (R. 6; R. 27). Petitioners transact their business with the Middletown Company through the latter's office in Newark, New Jersey (R. 6; R. 26). Petitioners also purchase certain dairy products, valued annually at $2,000, from the Raritan Valley Farms, Somerville, New Jersey (R. 6; R. 26–27). In addition, petitioners pur-

[1] In the following statement, the references preceding the semicolons are to the Board's findings and the succeeding references are to the supporting evidence.

chase in New York for distribution in New Jersey certain other dairy products, the value of which does not appear in the record (R. 6; R. 101–102).

On January 29, 1942, the Board filed in the court below a petition for enforcement of its order (R. 213–217). Petitioners answered, requesting dismissal of the Board's petition (R. 217–220). By its opinion of August 21, 1942, and its decree of September 9, 1942 (R. 221–225), the court enforced the Board's order in full.

ARGUMENT

Petitioners' contention that the Act may not be applied to their operations is without merit. Virtually all of the products which they sell and distribute, exceeding $180,000 in value each year, are received in interstate commerce. That commerce brings petitioners within the ambit of federal authority (cf. *Local 167, International Brotherhood of Teamsters* v. *United States,* 291 U. S. 293, 297; *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 282, 290–291; *Lemke* v. *Farmers Grain Co.,* 258 U. S. 50, 54; *United States* v. *Darby,* 312 U. S. 100, 114) and their relationship with their employees within the scope of the Act (*National Labor Relations Board* v. *Fainblatt,* 306 U. S. 601, 607). Whether the continued journey of these products from petitioners to their customers also constitutes interstate commerce or would alone bring petitioners within the scope of the National Labor Relations Act (cf. *Public Utilities Commission of Kansas* v. *Landon,* 249 U. S. 236; *Atlantic Coast*

Line R. R. Co. v. *Standard Oil Co.*, 275 U. S. 257; cf. *Industrial Association of San Francisco* v. *United States*, 268 U. S. 64) is not here the question (cf. *National Labor Relations Board* v. *Fainblatt*, 306 U. S. 601, 607; *Local 167, International Brotherhood of Teamsters* v. *United States*, 291 U. S. 293, 297; *Kirschbaum Co.* v. *Walling*, 316 U. S. 517).

The Circuit Courts of Appeals have uniformly held, in cases arising under the National Labor Relations Act, that unfair labor practices threatening to divert or obstruct the inflow of goods normally moving in interstate commerce, warrant application of the Act.[2] There are no contrary decisions.[3]

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[2] *N. L. R. B.* v. *Western Massachusetts Electric Co.*, 120 F. (2d) 455, 456–457 (C. C. A. 1); *Newport News Shipbuilding & Dry Dock Co.* v. *N. L. R. B.*, 101 F. (2d) 841, 843 (C. C. A. 4), modified in other respects, 308 U. S. 241; *N. L. R. B.* v. *A. S. Abell Co.*, 97 F. (2d) 951, 955 (C. C. A. 4); *N. R. L. B.* v. *Norfolk Shipbuilding & Dry Dock Corp.*, 109 F. (2d) 128, 129 (C. C. A. 4); *Virginia Electric & Power Co.* v. *N. L. R. B.*, 115 F. (2d) 414, 416 (C. C. A. 4), reversed and remanded on other grounds, 314 U. S. 469; *Consumers Power Co.* v. *N. L. R. B.* 113 F. (2d) 38, 40–41 (C. C. A. 6); *Wilson & Co.* v. *N. L. R. B.*, 124 F. (2d) 845, 846 (C. C. A. 7); *N. L. R. B.* v. *Sunshine Mining Co.*, 110 F. (2d) 780, 784 (C. C. A. 9), certiorari denied, 312 U. S. 678; *Southern Colorado Power Co.* v. *N. L. R. B.*, 111 F. (2d) 539, 543 (C. C. A. 10); *N. L. R. B.* v. *Suburban Lumber Co.*, 121 F. (2d) 829 (C. C. A. 3), certiorari denied, 314 U. S. 693.

[3] The cases in the circuit courts of appeals on which petitioners rely do not conflict with the decision below. *Blankenship* v. *Kurfman*, 96 F. (2d) 450 (C. C. A. 7), involved an

In determining whether the Act may be applied to petitioners' operations, the test is not, as petitioners suggest (Pet. 7–8, 19–20), the type of enterprise conducted, nor whether its relation to interstate commerce is "direct" or "indirect." It is now established that in adopting the National Labor Relations Act, it was the intention of Congress to exercise the full scope of its power under the commerce clause of the Constitution. *National Labor Relations Board* v. *Fainblatt,* 306 U. S. 601, 607.[4] In a recent determination of the scope of that power, this Court said (*Wickard* v. *Filburn,* No. 59, this Term, decided November 9, 1942) that:

> But even if appellant's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial eco-

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attempt by one labor union to enjoin another from interfering with its members in the course of their employment. The case pivoted on the applicability of the Norris-La Guardia Act to the dispute in question. The court's observations on interstate commerce were neither relevant to the determination of that case nor do they conflict with the decision below. Similarly, *S. S. Kresge Co.* v. *Amsler,* 99 F. (2d) 503 (C. C. A. 8), also involved an attempt to enjoin a labor union. The question of interstate commerce was not even considered by the court.

[4] See S. Rep. No. 573, 74th Cong., 1st sess., p. 19, where The Senate Committee reporting with reference to the Act said: "While this bill of course does not intend to go beyond the consitutional power of Congress, as that power may be marked out by the courts, it seeks the full limit of that power in preventing these unfair labor practices."

> nomic effect on interstate commerce and this irrespective of whether such effect is what might at some earlier time have been defined as "direct" or "indirect."

That test is fully met here. Stoppage of petitioners' operations would undeniably exert a substantial economic effect upon the inflow of large amounts of products normally obtained from without the State. And "If the flow of commerce is obstructed by labor disputes, it can make no difference from which direction the obstruction is applied." *Newport News Shipbuilding and Dry Dock Co.* v. *National Labor Relations Board,* 101 F. (2d) 841, 843 (C. C. A. 4), modified in other respects, 308 U. S. 241.

CONCLUSION

The decision of the court below is correct. There is no conflict of decisions. It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

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DECEMBER 1942.